IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

THOMSON REUTERS ENTERPRISE	
CENTRE GMBH and WEST PUBLISHING)
CORPORATION,)
)
Plaintiffs and)
Counterdefendants,) C.A. No. 20-613 (SB)
)
V.) REDACTED - PUBLIC VERSION
)
ROSS INTELLIGENCE INC.,)
)
Defendant and)
Counterclaimant.)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE CERTAIN TESTIMONY, ARGUMENT, AND EVIDENCE REGARDING THE OPINIONS OF RICHARD LEITER

OF COUNSEL:

Dale M. Cendali Joshua L. Simmons Eric A. Loverro KIRKLAND & ELLIS LLP 601 Lexington Avenue New York, NY 10022 (212) 446-4800

Miranda D. Means KIRKLAND & ELLIS LLP 200 Clarendon Street Boston, MA 02116 (617) 385-7500

Original filing date: February 13, 2023 Redacted filing date: February 23, 2023 Morris, Nichols, Arsht & Tunnell LLP Jack B. Blumenfeld (#1014) Michael J. Flynn (#5333) 1201 North Market Street P.O. Box 1347 Wilmington, DE 19899 (302) 658-9200 jblumenfeld@morrisnichols.com mflynn@morrisnichols.com

Attorneys for Plaintiffs and Counterdefendants Thomson Reuters Enterprise Center GmbH and West Publishing Corporation

TABLE OF CONTENTS

I.	DR. LEITER'S OPINIONS DO NOT FIT THE FACTS	2
II.	DR. LEITER'S OPINIONS ARE UNDULY SPECULATIVE	6
***	CONCLUCION	1.0
III.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases

	Page(s)
Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316 (3d Cir. 2003)	6
Dam Things from Den, a/k/a Troll Co. ApS v. Russ Berrie & Co., 290 F.3d 548 (3d Cir. 2002)	4
Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc., 307 F.3d 197 (3d Cir. 2002)	5
Educ. Testing Servs. v. Katzman, 793 F.2d 533 (3d Cir. 1986)	6
Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)	8
Furlan v. Schindler Elevator Corp., 864 F. Supp. 2d 291 (E.D. Pa. 2012)	6
Langbord v U.S. Dep't of the Treasury, No. 06 Civ. 05315, 2009 WL 1312576 (E.D. Pa. May 7, 2009)	3
New York v. Shinnecock, 523 F. Supp. 2d 185 (E.D.N.Y. 2007)	7
Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000)	6, 10
Pure Earth, Inc. v. Call, No. 09 Civ. 4174, 2011 WL 13380381 (E.D. Pa. Nov. 14, 2011)	10
In re TMI Litig., 193 F.3d 613 (3d Cir. 1999)	2, 6
In re Tylenol (Acetaminophen) Mktg., Sales Pracs., & Prods. Liab. Litig, No. 12 Civ. 2016 WL 4039324 (E.D. Pa. July 27, 2016)	7, 8
U.S. v. Ford, 481 F.3d 215 (2d Cir. 2007)	3
<i>U.S. v. Kantengwa</i> , 781 F.3d 545 (1st Cir. 2015)	7

vonRosenberg v. Lawrence, 413 F. Supp. 3d 437 (D.S.C. 2019)	3
West Publ'g Corp. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986)	9
Rules	
Fed. R. Evid. 702	2
Other Authorities	
Nimmer on Copyright § 2.03	6

Certain of Dr. Richard Leiter's opinions are irrelevant and confusing, or are pure *ipse dixit*, unmoored from the facts or any discernable methodology. As detailed in Plaintiffs' opening brief, D.I. 265 ("Pls.' Br."), allowing Dr. Leiter to present these opinions to the jury would complicate and prolong the trial, confuse the jury rather than assist it in deciding the factual issues, and risk putting before the jury so-called "expert" opinions that are not in fact based in any scientific methodology or reliable facts and data. ROSS's opposition, D.I. 309 ("Def.'s Opp.") posits meritless arguments that, if anything, further demonstrate why Dr. Leiter's opinions should be excluded.

Firs	et, Dr. Leiter's vague assertions that
	is unhelpful and confusing. As an initial matter,
	is dimerplat and confusing. The an initial matter,
	ROSS argues that these opinions are relevant to creativity and constraints
thereupon.	
Seco	ond, Dr. Leiter's opinions that
	are each
baseless.	Dr. Leiter has no basis to conclude that the modern

WKNS, which is what is at issue, And indeed,
ROSS admits repeatedly in its opposition that
ROSS acknowledges that Dr. Leiter does not in fac
And, as discussed in ROSS's opposition, Dr. Leiter identifies
To the contrary, Dr. Leiter admits that Dr. Leiter's opinions are pure
unsupported speculation and should not be presented to the jury. ¹

I. DR. LEITER'S OPINIONS DO NOT FIT THE FACTS

Under Third Circuit law, Rule 702's "fit" or "helpfulness" prong requires "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999) (excluding expert opinion where it was "supported by nothing other than conjecture" and therefore did not "fit" the facts); Fed. R. Evid. 702 (opinion must "assist the trier of fact to understand or to determine a fact in issue"). Plaintiffs are moving to exclude a subset of Dr. Leiter's opinions on the basis of lack of fit, in particular, his opinions on

To be clear, ROSS presents as "facts" in the factual background of its opposition a number of the opinions from Dr. Leiter's report, citing only to his report or citing nothing at all. For example, citing nothing, ROSS claims that

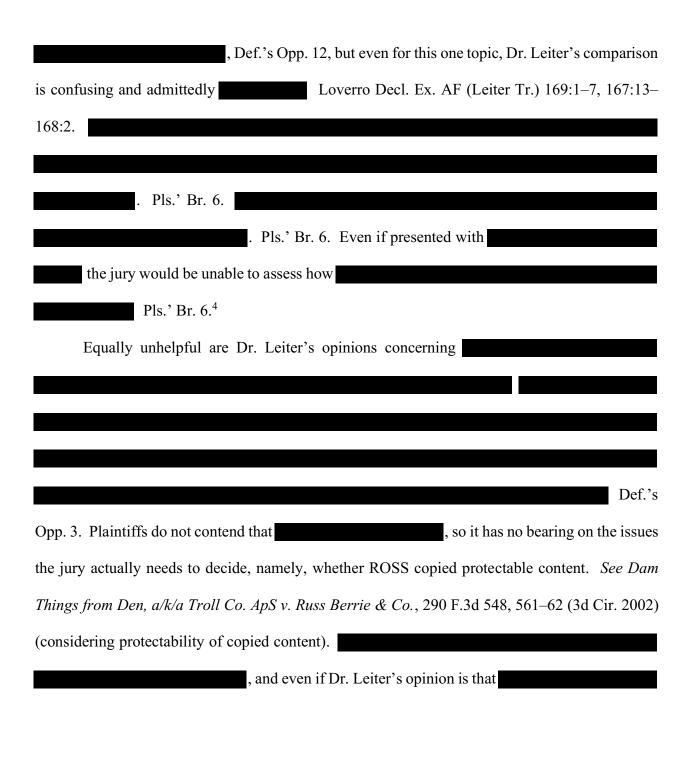
Def.'s Opp. 6. This is totally unfounded and Dr. Leiter's speculation that is the subject of this Motion. Moreover, while Plaintiffs are only moving to exclude certain opinions on the basis of *Daubert*, Plaintiffs do *not* concede the veracity or admissibility of other opinions in Dr. Leiter's report, which are not addressed herein.

, which are irrelevant, confusing, and unhelpful. ROSS claims that Dr. Leiter's opinions are relevant to copyright infringement and fair use. They are not. First, ROSS argues that Dr. Leiter's opinions on 1.2 No doubt creativity is relevant to the copyright claim. But Dr. Leiter's vague contention that does not help the jury assess the creativity of the WKNS as it looks today. Pls.' Br. 6.³ Dr. Leiter did not quantify or even identify D.I. 266 ("Loverro Decl.") Ex. AF (Leiter Tr.) 133:12–17. ROSS points to a single comparison that Dr. Leiter performed analyzing

ROSS strangely asserts that Plaintiffs' claim that

Def.'s Opp.. 9. To be clear, Plaintiffs claim that the Westlaw Content, specifically the West Headnotes and the selection and arrangement of the West Headnotes and cases within the West Key Number System are creative. Plaintiffs are not claiming copyrights in legal concepts, like the word "Contracts," rather, the creative selection and arrangement of those concepts, and the cases and headnotes as arranged in them.

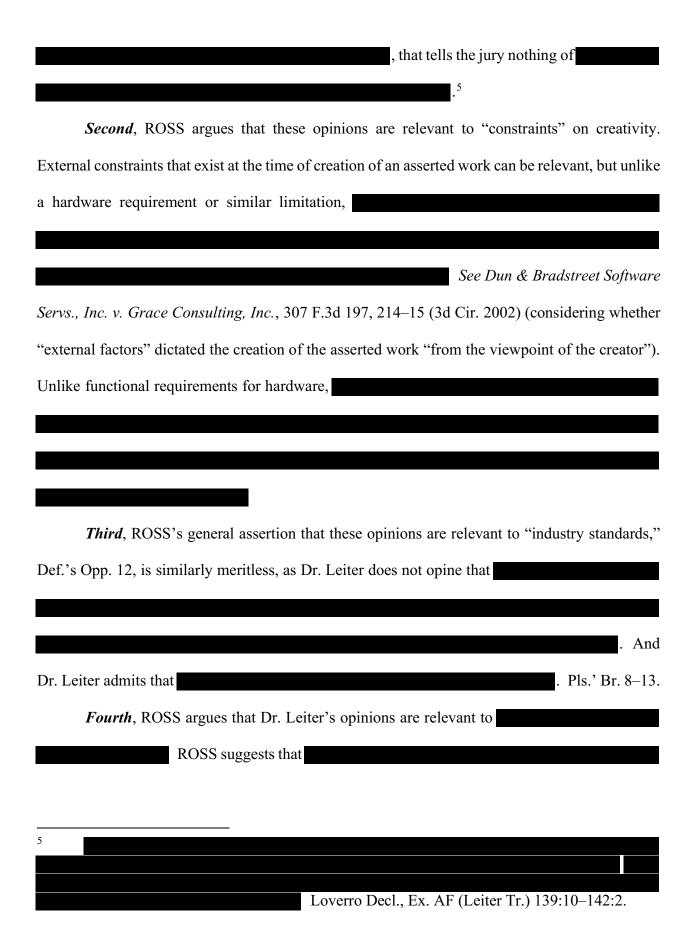
This is different from the cases on which ROSS relies. In *U.S. v. Ford*, the expert used "recognized techniques" to help identify a shoeprint that was found near the scene of the crime. 481 F.3d 215, 219 (2d Cir. 2007). In *Langbord v U.S. Department of the Treasury*, the expert offered testimony about the public availability of certain coins, which was a question squarely at issue. No. 06 Civ. 05315, 2009 WL 1312576, at *4 (E.D. Pa. May 7, 2009). ROSS also relies on *vonRosenberg v. Lawrence* for the contention that a historian's analysis may be helpful to a jury. 413 F. Supp. 3d 437, 450 (D.S.C. 2019). That was a trademark case and part of the question was whether a term was being used to reference a church, so the history of that term's use was directly on point. That is not the case here.



ROSS's opposition admits that

Def.'s Opp. 12. This only further illustrates the problem with

Dr. Leiter's opinions—they do not help the jury to determine



Def.'s Opp. 11. But many copyrighted works have purposes and are not utilitarian in the copyright sense. See 1 Nimmer on Copyright § 2.03 (describing how subjective judgment in the selection and arrangement of facts is sufficient for copyright protection). In the Third Circuit, to be "utilitarian" in the copyright sense means the idea and the expression "merge," i.e. there are no other methods for expressing the same idea. See Educ. Testing Servs. v. Katzman, 793 F.2d 533, 539 (3d Cir. 1986) (merger does not apply even if there is a "limited number of ways" to create work). Dr. Leiter's opinions on

II. DR. LEITER'S OPINIONS ARE UNDULY SPECULATIVE

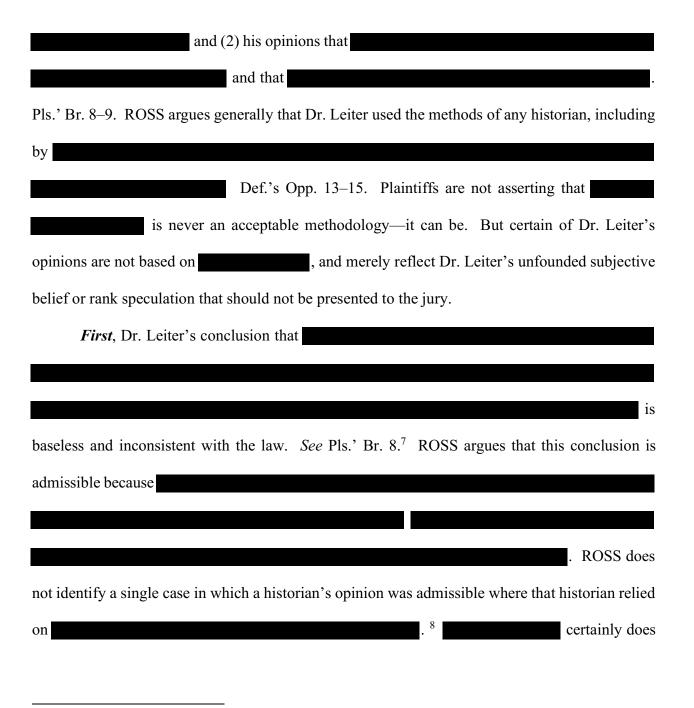
"6 Def.'s Opp. 10.

For expert testimony to be reliable, it needs to be based on the "methods and procedures of science" *and* "sufficient facts or data," not mere subjective belief or speculation. *See Calhoun v. Yamaha Motor Corp.*, *U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 155 (3d Cir. 2000); *In re TMI Litig.*, 193 F.3d at 669–670 (excluding speculative expert opinions and finding that opinions based in speculation are not reliable); *Furlan v. Schindler Elevator Corp.*, 864 F. Supp. 2d 291, 296 (E.D. Pa. 2012) (excluding opinion where expert based his opinion on a photograph, rather than conducting any tests).

As detailed in Plaintiffs' opening brief, certain of Dr. Leiter's opinions do not meet either of these requirements, specifically: (1) Dr. Leiter's opinions that

That Lexis also organizes law alphabetically by area of law is irrelevant; Plaintiffs are not claiming rights in the idea of organizing law alphabetically by area, they are claiming rights in their specific detailed organization, which ROSS admits

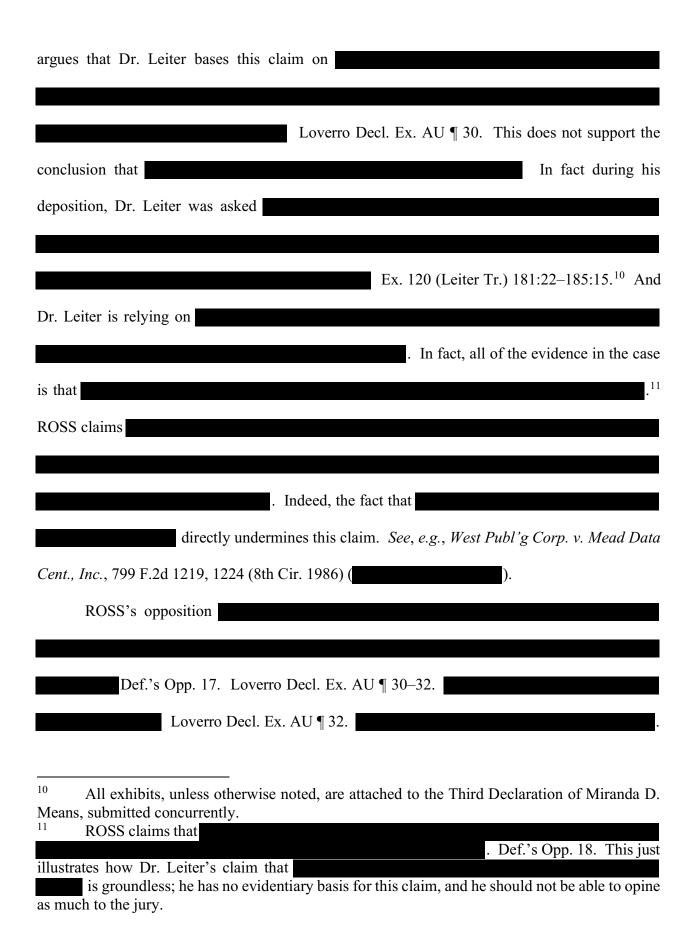
Pls.' Br. 8–9.



ROSS generally argues Dr. Leiter's opinions on are relevant, Def.'s Opp. 11, but Plaintiffs did not move on those grounds, they moved to exclude the opinions on functionality based on lack of an accepted methodology and lack of factual basis.

ROSS relies on cases involving extensive historical research not done here. In *U.S. v. Kantengwa*, the historical expert based his opinions not only on interviews, but also on their consistency with other accounts of the Rwandan genocide and surveyed extensive historical sources in reaching his conclusions. 781 F.3d 545, 562 (1st Cir. 2015). In *New York v. Shinnecock*, the expert outlined extensive historical sources in great detail in his report. 523 F. Supp. 2d 185, 262 (E.D.N.Y. 2007). In *In re Tylenol (Acetaminophen) Marketing, Sales Practices, & Products Liability Litigation*, the expert reviewed regulations and their historical content and analyzed them

not provide Dr. Leiter with a basis to claim that
Supra 8.
And Dr. Leiter did no further research into
See Pls.' Br. 8–9.
ROSS protests that Dr. Leiter did not need to interview anyone to support his opinions on
. Def.'s Opp. 15.9 But interviews are just an example of one type of methodology
Dr. Leiter could have used to garner support for his opinions—instead, he employed <i>no</i> discernable
methodology to determine See Pls.'
Br. 9. If Dr. Leiter had support for his conclusions, and his only failure was his lack of interviews,
then that could be taken up on cross examination. But his rank speculation that
has no basis, and Daubert is designed to prevent such ipse
dixit from being presented to a lay jury. See Elcock v. Kmart Corp., 233 F.3d 734, 745 (3d Cir.
2000) (expert must have "good grounds for his or her belief").
Second, as detailed in Plaintiffs' opening brief, Dr. Leiter's opinion that
, see Loverro Decl. Ex. AU (Leiter Op. Rpt.) ¶ 33, is baseless. ROSS
based on his experience and knowledge of regulation. No. 12 Civ. 7263, 2016 WL 4039324, at *5, n.14 (E.D. Pa. July 27, 2016). 9 ROSS mentions
Ex. 120 (Leiter Tr.) 232:6–19 ("Q:
So just to be clear, did Mr. Dabney tell you that West exercises no creativity whatsoever in designing the subtopics? Is that what he told you? A. No.").



Pls.' Br. 11.

. See Oddi, 234 F.3d

at 146 (examining whether expert's opinions "reliably flow from the facts known to the expert" in determining admissibility under *Daubert*); *Pure Earth, Inc. v. Call*, No. 09 Civ. 4174, 2011 WL 13380381, at *3 (E.D. Pa. Nov. 14, 2011) (excluding expert opinion based on insufficient facts and data).

III. CONCLUSION

Plaintiffs respectfully request that their motion to exclude certain testimony, argument, or evidence regarding the opinions of Dr. Richard Leiter be granted.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

OF COUNSEL:

Dale M. Cendali Joshua L. Simmons Eric A. Loverro KIRKLAND & ELLIS LLP 601 Lexington Avenue New York, NY 10022 (212) 446-4800

Miranda D. Means KIRKLAND & ELLIS LLP 200 Clarendon Street Boston, MA 02116 (617) 385-7500

February 13, 2023

/s/Michael J. Flynn

Jack B. Blumenfeld (#1014) Michael J. Flynn (#5333) 1201 North Market Street P.O. Box 1347 Wilmington, DE 19899 (302) 658-9200 jblumenfeld@morrisnichols.com mflynn@morrisnichols.com

Attorneys for Plaintiffs and Counterdefendants Thomson Reuters Enterprise Center GmbH and West Publishing Corporation

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on February 13, 2023, upon the following in the manner indicated:

David E. Moore, Esquire
Bindu Palapura, Esquire
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 North Market Street
Wilmington, DE 19801
Attorneys for Defendant and Counterclaimant

VIA ELECTRONIC MAIL

Mark A. Klapow, Esquire
Lisa Kimmel, Esquire
Crinesha B. Berry, Esquire
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Attorneys for Defendant and Counterclaimant

VIA ELECTRONIC MAIL

Gabriel M. Ramsey, Esquire
Jacob Canter, Esquire
Warrington Parker, Esquire
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Attorneys for Defendant and Counterclaimant

VIA ELECTRONIC MAIL

/s/ Michael J. Flynn

Michael J. Flynn (#5333)